STATE OF MICHIGAN

COURT OF APPEALS

KHALIL MOGASSABI,

Plaintiff Counter-Defendant/
Appellant Cross-Appellee,

v

BRADLEY CHOJNACKI and CHRISTIANA CHOJNACKI,

Defendants Counter-Plaintiffs/
Third Party Appellees Cross-
Appellants,

and

MARY MULLER,

Third Party Defendant.

UNPUBLISHED
February 12, 2008

No. 267922
Oakland Circuit Court
LC No. 2003-047080-CH

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

In this property dispute involving a portion of a driveway, plaintiff appeals as of right the trial court's judgment denying him relief in part, the court's denial of damages on his nuisance claim, its denial of his motion to amend complaint to conform to the evidence, and various other rulings. Defendants cross-appeal by delayed leave granted the trial court's denial of their motion for case evaluation sanctions and the trial court's partial grant of plaintiff's motion to tax costs. We affirm in both the principal appeal and the cross-appeal.

I

Plaintiff Khalil Mogassabi owns the property at 1139 Emmons in Birmingham. Defendants Chojnacki during pertinent times lived directly east of plaintiff, at 1155 Emmons. This property dispute began after plaintiff complained to defendants of the stench emanating from feces of defendants' two Labrador Retrievers in defendants' backyard. The City of Birmingham cited defendants several times, and eventually issued a misdemeanor ticket.

When plaintiff purchased the property in 2001, a chain link fence divided the rear portion of the two properties. After plaintiff complained to defendants regarding the dog feces, defendants built a wooden privacy fence running from the front of their home to the rear of their property, including alongside approximately 20' of plaintiff's driveway.

Plaintiff filed a two-count complaint alleging intentional private nuisance in fact and negligent private nuisance in fact. Plaintiff alleged that the fencing along his driveway prevented him and his housemate, Mary Muller, from access to the rear portion of their driveway and to the detached garage behind plaintiff's house.[1]

After defendants learned that a survey plaintiff had done during discovery revealed that plaintiff's driveway encroached on defendants' property by approximately one inch, defendants counter-claimed, seeking to quiet title, and alleging trespass (that plaintiff's driveway encroached approximately one inch on their property), and slander of title (by virtue of plaintiff's filing of a lis pendens). Defendants also filed a third-party complaint against Mary Muller. Plaintiffs filed an amended complaint alleging adverse possession, acquiescence and prescriptive easement.

Pursuant to various cross-motions for summary disposition, the circuit court dismissed plaintiff's nuisance claims, defendants' slander of title claim, and defendants' claims against Muller, and granted plaintiff a prescriptive easement to use the one-inch strip of the driveway that encroached on defendants' property. The court denied various motions to amend the complaint to enlarge the area subject to the prescriptive easement claim. Following a bench trial, the trial court ruled in plaintiff's favor on his claim of adverse possession. The court denied plaintiff's motion to amend his complaint to conform to the evidence, and denied defendants' post-judgment motion for case evaluation sanctions.

II

Plaintiff asserts that the trial court erred in failing to grant him a prescriptive easement for driveway purposes (1) when his complaint sufficiently pleaded a claim for prescriptive easement, (2) the undisputed facts showed that plaintiff and his predecessors in interest used the concrete and nearby land for driveway purposes for decades, and (3) the proofs at trial overwhelmingly supported a prescriptive easement. Plaintiff contends that, in any event, the trial court should have granted leave to amend. We find no error.

This Court reviews the trial court's denial of plaintiff's motions for leave to amend to file a second amended complaint for an abuse of discretion. *Franchino v Franchino*, 263 Mich App 172, 189; 687 NW2d 620 (2004). Motions to amend should be denied only for specific reasons, including " '[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3]

[1] The driveway on plaintiff's property had been built in 1976, at about the same time as the detached garage was built. Along the pertinent 20' of plaintiff's driveway, it is less than 6'6" wide at its narrowest point. The vehicles plaintiff and Muller drove measured 6'10" across from mirror to mirror (Volkswagen) and 7'5" across (Jeep Explorer).

repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . .' " [*Id.*, quoting *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997), quoting *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).]

We note preliminarily that, contrary to plaintiff's argument, the trial court did not fail to grant him a prescriptive easement. Rather, the trial court found that plaintiff established a prescriptive easement over the one-inch strip of driveway that encroached on defendants' property. It was plaintiff's attempts to expand the area of the prescriptive easement beyond the one-inch strip that the trial court rejected.

Plaintiff first asserts that his amended complaint sufficiently pleaded a prescriptive easement over the area adjacent to the driveway. We disagree. The trial court accurately observed that plaintiff's amended complaint sought a declaration "that he is the lawful holder of a prescriptive easement over the disputed strip of property." The complaint described "the disputed property" as the 20' of plaintiff's driveway that encroached on defendants' property by a width of approximately one inch. The record supports that the first notice defendants received that plaintiff was seeking a prescriptive easement that encompassed more than the disputed one inch of driveway was plaintiff's April 2004 summary disposition motion.

Plaintiff next asserts that he was entitled to summary disposition on his claim to a prescriptive easement over at least eighteen inches along the driveway. The court denied this request on the basis that this area was not covered by the complaint. As indicated above, we find no error in this conclusion. Similarly, the trial court did not address this issue in its decision because it was not within the complaint.

Plaintiff argues that regardless of whether his amended complaint was sufficient to cover the area adjacent to the driveway, the court should have granted his various motions to amend the complaint to cover this area. On August 18, 2004, the court entered its order denying plaintiff summary disposition as to the eighteen inches referred to in his motion, on the basis that the complaint only referred to the one-inch encroachment. On October 15, 2004, plaintiff filed a motion to file a second amended complaint to allege a prescriptive easement covering four feet along the driveway. At the time this motion was filed, the case had been pending for 21 months, discovery had been closed for 10 months, and trial was scheduled to start on December 6, 2004. The court denied the motion, finding undue delay and prejudice to defendants. After trial was adjourned, plaintiff obtained an order permitting the amendment of witness lists. The case was reassigned, and plaintiff filed a renewed motion for leave to file a second amended complaint, relying on the facts that trial had been adjourned without date and plaintiff had been granted leave to file an amended witness list as support for the argument that defendants would not be unduly prejudiced by the amendment. This motion was denied in April, 2005, the court concluding that the predecessor judge's decision was correct. After the bench trial concluded, plaintiff again sought to amend his complaint, arguing that amendment was necessary to "more definitively describe the prescriptive easement already alleged." The trial court denied plaintiff's motion once again.

Although "delay alone does not justify denying a motion to amend," *Franchino, supra* at 191, "a trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial,

and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial." *Id.* at 192.

We find no error in the trial court's denial of plaintiff's motions seeking easements of greater than the one-inch strip of the driveway given plaintiff's delay in seeking a prescriptive easement greater than the disputed one-inch strip of driveway. We also conclude for the same reason that the trial court did not abuse its discretion by denying plaintiff's multiple motions for leave to file a second amended complaint. While plaintiff correctly observes that the area adjacent to the driveway was implicated in the proceedings from the start, the original and amended complaints having asserted that the fence, constructed entirely on defendants' property, interfered with plaintiff's ability to freely use and access his driveway and garage, those complaints sought to enforce plaintiff's rights under a nuisance theory. Thus, defendants faced proceedings that sought to enforce plaintiff's right to have the fence removed to its original location, and to have the property line revised to the line of the driveway. In the face of these claims, defendants endeavored to restore the fence to its original location, and prepared for suit over the one-inch strip. Plaintiff's second amended complaint changed the nature of the lawsuit by claiming not only a right to have the fence relocated so that plaintiff could use his own property, but a real property interest in four feet of defendants' property. The court did not abuse its discretion is concluding that the attempt to radically change the nature of the action came too late in the litigation.

III

Plaintiff also asserts that the trial court erroneously dismissed his nuisance claim because a defendant may be held liable for damages for a temporary nuisance and plaintiff may be protected with permanent injunctive relief and, in any event, defendants' removal of portions of the fence did not abate the nuisance.

"To be liable for damage caused by a nuisance, the defendants must have: (1) created the nuisance; (2) owned or controlled the property from which the nuisance arose; or (3) employed another to do work he knew is likely to create a nuisance." *Radloff v State*, 116 Mich App 745, 758; 323 NW2d 541 (1982). "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992), citing 4 Restatement Torts, 2d, § 821-D, p 100. The invasion need not be a physical or tangible one. *Id.* at 306.

> [A]n actor is subject to liability for private nuisance for a nontrespassory invasion of another's interest in the private use and enjoyment of land if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [*Adkins, supra*, 440 Mich at 304, citing 4 Restatement Torts, 2d, §§ 821D-F, 822, pp 100-115.]

The court initially dismissed plaintiff's nuisance claims on the ground that defendants had removed the fence, and the alleged nuisance no longer existed. Plaintiff sought

reconsideration of this ruling not on the basis asserted here--that damages were nevertheless available for the time period during which plaintiff suffered the consequences of the nuisance--but on the basis that the fence had not, in fact, been relocated to its previous location, as a 34" portion remained, the posts were still present, and plaintiff's access to his garage was still impeded. By the time the motion was heard, the posts had been removed, and the court found no reason to grant reconsideration, concluding that other than the interference presented by the posts, plaintiff presented no evidence of a legally significant interference. Subsequently, plaintiff filed a motion to compel defendants to remove the remaining 34" of fence, and for sanctions, and defendants removed the remaining 34" of fence before the motion was heard. Plaintiff's request for sanctions was based on defendants' alleged misrepresentations in pre-trial motions regarding removal of part of the privacy fence and their claims that the nuisance had thus been abated. The trial court ultimately denied plaintiff sanctions.

Plaintiff's arguments regarding defendants' entitlement to summary disposition on the nuisance claims and his motion for reconsideration addressed only whether the nuisance had in fact been removed, and not whether plaintiff could still recover damages for its temporary maintenance, or whether a permanent injunction would be appropriate. Plaintiff belatedly sought money damages for the alleged nuisance in his trial brief. He further sought to offer testimony regarding emotional distress damages at trial and filed a motion to permit such testimony, which was denied. Given plaintiff's focus on the existence of the nuisance, rather than damages or injunctive relief, we find no error in the court's dismissal of the claims and denial of reconsideration. Nor do we find error in the court's refusal to permit plaintiff to resurrect the nuisance claims at trial.[2] Defendants had no reason to expect that plaintiff would attempt to resuscitate his nuisance claims at trial. See *Franchino, supra* at 192.

IV

On cross-appeal, defendants assert that the trial court abused its discretion by denying their motion for case evaluation sanctions, where plaintiff failed to improve his position from the $1 awarded him at case evaluation. We do not agree.

A trial court's decision whether to award case evaluation sanctions under MCR 2.403 involves a question of law that is reviewed de novo. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). MCR 2.403(O) provides in pertinent part:

> (O) **Rejecting Party's Liability for Costs.**
>
> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. . . .

[2] We observe that we might have come to a different conclusion regarding plaintiff's claims for injunctive relief had defendants not restored the fence to its original location, removed the posts, and moved away by the time the case was decided.

(2) For the purpose of this rule "verdict" includes * * *

(b) a judgment by the court after a nonjury trial.

* * *

(5) If the verdict awards equitable relief, costs may be awarded if the court determines that

(a) Taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and

(b) It is fair to award costs under all of the circumstances.

(6) For the purpose of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

MCR 2.403(K) provides in pertinent part:

(K) **Decision.**

* * *

(3) The evaluation may not include a separate award on any claim for equitable relief, but the panel may consider such claims in determining the amount of an award.

At the time the case was evaluated on March 24, 2004, plaintiff's nuisance claims had been dismissed (the parties apparently were unaware of this—the order of dismissal having been entered only several days before, on March 19, 2004). The case evaluators awarded one dollar to each party. Defendants accepted and plaintiff rejected the award. Following the bench trial, the trial court entered judgment in plaintiff's favor on his adverse possession claim. Defendants did not prevail on either their counter-claim or third-party claim (all of defendants' claims except the trespass claim against plaintiff Mogassabi were dismissed before trial, either on motion or voluntarily, and the trespass claim failed at trial).

MCR 2.403(K)(3) allows case evaluators to consider claims for equitable relief in determining the amount of the award, but the evaluation may not include a separate award on any claim for equitable relief. See *Kusmierz v Schmitt*, 268 Mich App 731, 743; 708 NW2d 151 (2005), rev'd in part on other grounds 477 Mich 934 (2006). Plaintiff's adverse possession claim is one for equitable relief. *Gorte v Dep't of Transportation*, 202 Mich App 161, 165; 507 NW2d 797 (1993) (action seeking to quiet title through claim of adverse possession is equitable in nature).

MCR 2.403(O)(5) governs sanctions after equitable relief is granted to a rejecting party. Dean & Longhofer, Michigan Court Rules Practice, § 2403.21, p 531.

> MCR 2.403(O)(5) was designed to govern actions combining claims for equitable and monetary relief. As written, the subrule states that if equitable relief is granted to a rejecting party, the court must then determine whether or not an award of costs against that party is fair even though the party did not improve his or her position monetarily. . . . We believe that, if a party prevails and receives the equitable relief sought, costs should not be assessed against that party. [*Id.* at 531-532.]

Defendants argue that the verdict is not more favorable to plaintiff than the case evaluation of one dollar, because plaintiff has always used the one inch strip of driveway and plaintiff thus did not improve his position at trial through equitable relief. Defendants further argue that because the trial court granted plaintiff's summary disposition motion as to the one inch prescriptive easement claim *before trial*, plaintiff did not improve his position at trial.

MCR 2.403(O)(5) governs the instant case. Dean & Longhofer, *supra.* Defendants' argument that since plaintiff was granted a prescriptive easement before trial, he did not improve his position at trial ignores that plaintiff prevailed at trial on his adverse possession claim, and that a prescriptive easement is not equivalent to adverse possession. "An easement is the right to use the land of another for a specified purpose." *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997). An easement does not dispossess the owner of the land—it grants the easement holder qualified possession "only to the extent necessary for enjoyment of the rights conferred by the easement." *Id.* In contrast, ownership by adverse possession vests the possessor with all of the property rights, including the right to exclude others from one's land. See *Walker v Bowen*, 333 Mich 13, 21; 52 NW2d 574 (1952). Plaintiff's success at trial on his adverse possession claim thus did improve his position over his pre-trial success on his prescriptive easement claim.

Defendants also maintain that their repeated attempts to settle this matter before trial, including after the case was evaluated, support their entitlement to case evaluation sanctions. As defendants cite no authority in support, either in their appellate brief or appellate reply brief, this issue is abandoned. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004); *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

In any event, plaintiff prevailed on his claim of adverse possession at trial. The relief awarded plaintiff at trial thus exceeded the prescriptive easement he had been granted before trial. Under these circumstances, the trial court could properly conclude that plaintiff improved his position at trial, albeit not monetarily. It cannot be said that the trial court erred in concluding under MCR 2.403 that an award of costs against plaintiff would not be fair even though plaintiff failed to improve his position monetarily.

We conclude that the trial court properly denied defendants' motion for case evaluation sanctions.

V

Defendants' final argument on cross-appeal is that this Court should reverse the trial court's partial taxation of costs because neither party prevailed in full. We disagree.

The taxation of costs against a non-prevailing party is within the trial court's discretion. *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997); MCR 2.625(A). This Court reviews the trial court's decision to permit taxation of costs for an abuse of discretion. *Portelli v IR Construction Products*, 218 Mich App 591, 604; 544 NW2d 591 (1996). "Generally, costs are allowed to the prevailing party." *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 245; 635 NW2d 379 (2001), citing MCR 2.625(A)(1)[3]. "In order to be considered the prevailing party, [the party] was required to show at the very least that its position was improved by the litigation." *Id.* "The power to tax costs is wholly statutory. Therefore, costs are not recoverable where there is no statutory authority for awarding them." *Portelli, supra* at 605 (citations omitted).

Defendants assert that since plaintiff only prevailed on two of the five claims he asserted (prescriptive easement and adverse possession) and since the trial court denied defendants' request for case evaluation sanctions on the three claims on which they prevailed, plaintiff is not a prevailing party and is not entitled to tax costs. Defendants cite one published decision in support of this argument, *Barnett v Int'l Tennis Corp*, 80 Mich App 396; 263 NW2d 908 (1978).

The plaintiff in *Barnett* was a shareholder and director of the defendant corporation. Barnett brought a shareholder's derivative suit against the defendant corporation and three individuals. His suit sought "restoration to the corporation of a portion of salaries paid to defendants Brode and Greenspan, dissolution of the corporation and for the corporation to buy out his shares, and for attorney's fees." *Id.* at 399. The defendants counterclaimed, requesting an order that the plaintiff execute a personal guarantee of a loan. Barnett's claim against the third individual, Minkin, was dismissed at the close of Barnett's proofs. The trial court dismissed the defendants' counterclaim, ordered Brode and Greenspan to repay a portion of their salaries to the corporation, and refused to dissolve the corporation or to order the corporation to buy out Barnett's shares. This Court affirmed the trial court's denial of both parties' motions to tax costs because neither party had prevailed in full. *Id.* at 414-415.

Defendants argue that *Barnett* is indistinguishable from the instant case because the plaintiffs in both cases prevailed on a minority of the claims they alleged in their complaints, the defendants did not prevail on their counterclaims, and both parties sought to tax or otherwise

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[3] MCR 2.625(A)(1) provides:

> (A) **Right to Costs.**
>
> (1) *In General.* Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise for reasons stated in writing and filed in the action.

impose costs on their opponents. Defendants assert that their efforts to impose costs on plaintiff--their motion for case evaluation sanctions, which, under MCR 2.403(O)(6) included an implied taxation of all costs otherwise available under MCR 2.625--was denied by the trial court, as was the defendants' motion to tax costs in *Barnett*. Thus, defendants argue, the same result should obtain here as in *Barnett*—a denial of plaintiff's motion to tax costs. We disagree.

Barnett does not stand for the proposition that where neither party prevails in full, a trial court errs in allowing the taxation of costs; rather, it recognizes that a trial court's decision to allow taxation of costs in that situation is discretionary. Before trial, plaintiff was successful on his claim for prescriptive easement. At the conclusion of the case, judgment entered in plaintiff's favor on adverse possession. Defendants' counterclaims had been dismissed or abandoned during the litigation.

Barnett does not compel the conclusion that defendants advance. Plaintiff did not prevail on his acquiescence and nuisance claims--that is correct. However, although plaintiff did not prevail on his acquiescence claim, the adverse possession and acquiescence counts sought the same relief—ownership of the portion of plaintiff's driveway that encroached on defendants' property. Thus, they were inconsistent alternative counts seeking the same relief. Plaintiff is correct that it is not necessary to prevail on all theories, especially where inconsistent alternative theories are asserted, as permitted under MCR 2.111(A)(2). See *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 560-561; 595 NW2d 176 (1999), citing *Van Zanten v H Vander Laan Co, Inc*, 200 Mich App 139, 141; 503 NW2d 713 (1993); see also Dean & Longhofer, Michigan Court Rules Practice (2003 Supp), § 2625.2, p 65.

As to plaintiff's nuisance claim, although he did not obtain damages, the nuisance was, in fact, abated as a result of the litigation. That a party was not awarded damages on one of several different theories pleaded does not compel the conclusion that it is not a prevailing party. To be a prevailing party, the plaintiff must have, at the least, improved his position. See *Citizens Ins Co of America*, *supra*, 247 Mich App at 245 (to be prevailing party, party must show at least that its position was improved by the litigation), see also *VanZanten*, *supra* at 140-142 (where plaintiff pleaded breach of contract, breach of warranty and Consumer Protection Act claims and prevailed on breach of warranty claim, but not on Consumer Protection Act claim, plaintiff needed to prevail only on one theory to be considered prevailing party under MCL 600.2591 where each of three theories sought to recover for same injury).

Finally, defendants' sub-argument that the trial court should not have allowed plaintiff to tax costs where the trial court denied defendants' motion for case evaluation sanctions is unsupported by authority, and is thus abandoned. *Harris*, 261 Mich App at 50; *Yee*, 251 Mich App at 406.

We conclude that the trial court properly allowed plaintiff to tax costs.

Defendants challenge $20 in motion fees, $360 in motion fees and appeal fees, and survey costs of $2,176. Regarding the $20 motion fee, MCL 600.2441(2)(b) provides:

> (2) In all civil actions . . . in the circuit court, . . . the following amounts shall be allowed as costs in addition to other costs unless the court otherwise directs:

(b) For motions that result in dismissal or judgment, $20.00.

On plaintiff's motion for summary disposition, the trial court granted judgment in plaintiff's favor on his prescriptive easement claim. The statute does not require that there have been a final judgment. Defendants' challenge to the $20 motion fee is thus without merit.

Defendants object to various motion fees, including a motion to adjourn trial that they claim was unopposed; court fees paid for appeals, on which plaintiff did not prevail; and motions on which plaintiff did not prevail. Defendants cite no supporting authority, thus this issue is abandoned. *Harris*, *supra*; *Yee*, *supra*. In any event, we agree with plaintiff that under MCL 600.2529(2), costs associated with litigation include $20 for each motion filed in a case, and fees paid to the circuit court clerk upon appeals to this Court or the Supreme Court, and that such costs are taxable. Defendants' objection to the various motion fees thus fails.

Finally, defendants object to the award of fees for surveys plaintiff had done of the driveway and surroundings, asserting they were unnecessary for the judgment. Defendants cite no authority in support, thus this argument is not properly presented. Further, as plaintiff argues, taxable costs are not confined to the judgment, and the survey attached to the judgment and recorded was needed to describe the property plaintiff acquired by adverse possession. The nature of the case necessitated a survey.

We affirm in both the principal appeal and cross-appeal.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Christopher M. Murray